

W.P. (C) No.6651 of 2007

In the matter of an application under Article 226 of the Constitution of India.

M/s Ramkrishna Forging Limited... .. Petitioner

Versus

Jharkhand State Electricity Board and others... .. Respondents

For the Petitioner:

M/s. A.K. Yadav, N.K. Pasari, J.S. Pasari

For the Respondents:

M/s. Rajesh Shankar, Abhay Prakash, Dheeraj Kumar

PRESENT : HON'BLE MR. JUSTICE M. Y. EQBAL
HON'BLE MR. JUSTICE D.K.SINHA

Reserved on: 10.06.2008

Pronounced on: 23rd July, 2008

JUDGMENT

M. Y. Eqbal, J. In this writ petition, the petitioner has prayed for issuance of writ

for quashing the order as contained in letter dated 8.11.2007 issued by the Electrical Superintending Engineer, Jamshedpur, whereby he has refused to reduce the contract demand of the petitioner from 4000 KVA to 1325 KVA on the basis of Clause 9(b) of the High Tension Agreement and further for a direction to the respondents to immediately reduce the load of the petitioner's unit from 4000 KVA to 1325 KVA on the basis of application made by the petitioner on 20.09.2007.

2. Petitioner's case *inter alia* is that it is a small scale industry having several units at Adityapur (Jamshedpur) and the instant case pertains to Plant 3 & 4 situated by the side at Phase-VII of the Industrial area at Adityapur. In 2004 petitioner entered into an agreement with the Jharkhand State Electricity Board (in short 'the Board') on 14.04.2004 for High Tension connection having connected load of 325 KVA. According to the petitioner, because of continuous demand of products of the petitioner, it decided to enhance its production and as such applied for enhancement of its load from 325 KVA to 1325 KVA which was allowed by the General Manager-cum-Chief Engineer of the Board on 14.3.2006. An agreement to that effect was entered into between the petitioner and the respondent-Board for enhanced load of 1325 KVA. Again in the 2006 itself, petitioner further made a request to the Board for enhancement of load from 1325 KVA to 3500 KVA which was duly allowed by the General Manager-cum-Chief Engineer of the Board vide letter dated 26.12.2006. Again on the request of the petitioner, further load of 500 KVA was



sanctioned and an agreement to that effect was entered into between the petitioner and the respondent-Board on 07.7.2007 for supply of 4000 KVA in the unit of the petitioner. However, the petitioner alleged that after enhancement of load from 3500 to 4000 KVA, petitioner was facing major power trippings as well as continuous load shedding which was affecting the costly machineries and, therefore, the petitioner decided to reduce the load from 4000 KVA to 1325 KVA. Accordingly, petitioner made an application on 20.9.2007 before the authority of the respondent-Board for reduction of contract demand from 4000 KVA to 1325 KVA. The said letter was followed by another letter dated 05.10.2007. The said application was rejected by the Electrical Superintending Engineer and the same was communicated vide letter dated 8.11.2007 informing the petitioner that from the date of enhancement of supply, the agreement is enforced for a period of three years and if at all, the petitioner decides to terminate the agreement, in that event the petitioner is to bear the liability of three years i.e. the petitioner will have to pay the minimum guarantee charges and other charges for the remaining period of the agreement. The petitioner's case is that the Board cannot refuse to reduce the load, especially when the Board is unable to supply energy as per requirement of the petitioner, failing which the petitioner would have no option but to close down its unit, rather to avail the electric supply from the Board.

3. The respondents' case in the counter affidavit is that the Jharkhand State Regulatory Commission (in short 'Regulatory Commission') in exercise of its power conferred by Clause 10 the sub-section 2 of Section 181 read with Section 50 of the Electricity Act, 2003 has issued a notification known as (Electricity Supply code), Regulation 2005. According to Clause 9 of the Regulation, the reduction of load shall be allowed by the Distribution Licensee only after the expiry of initial period of agreement. The Board's case is that earlier the petitioner executed an agreement on 16.4.2004 for a contract demand of 325 KVA. Subsequently, a separate agreement was executed on 12.9.2006 for a contract demand of 1325 KVA. Further on 07.7.2007, the petitioner executed an agreement for a contract demand of 4000 KVA. The application filed by the petitioner for reduction of load was duly considered by the Electrical Superintending Engineer and the same was refused on the ground that reduction cannot be allowed in view of clause 9(a) of the H.T. Agreement and the relevant provisions of the Regulation.

4. The first agreement entered into between the petitioner and the Board for a contract demand of 325 KVA is dated 16.4.2004 a copy of which has been annexed as annexure-1 to the writ petition. The last agreement entered into between the parties was 07.7.2007 for a contract demand of 4000 KVA by enhancing load from 35100 KVA. A copy of the said agreement has been annexed as annexure 5 to the writ petition. Clause 9(a) and (b) of the agreement read as under:

"9(a) The consumer shall not be at liberty to determine this agreement before the expiration of three years from the date of commencement of the supply of energy. The consumer may determine this agreement with effect from any date after the said period on giving to the Board not less than twelve calendar months' previous notice in writing in that behalf and upon the expiration of the period of such notice this agreement shall cease and determine without prejudice to any right which may then have accrued to the Board hereunder provided always that the consumer may at any time with the previous consent of the Board transfer and assign this agreement to another person and upon subscription of such transfer, this agreement shall be binding on the transferee and Board and take effect in all respects as if the transferee had originally been a party hereto in place of the consumer who shall henceforth be discharged from all liabilities under or in respect thereof.

(b) In case the consumer's supply is disconnected by the Board in exercise of its powers under this agreement and/or law and the consumer does not apply for reconnection in accordance with law within the remainder period of the compulsorily availing of supply as stated above or the period of notice whichever be longer, he will be deemed to have given a notice on the date of the disconnection in terms of aforesaid clause 9(a) for the determination of the agreement and on expiration of the abovesaid remainder period of compulsorily availing of supply or the period of notice whichever is longer, this agreement shall cease and determine in the same way as above way as above."

5. The relevant portion of the Jharkhand State Regulatory Commission (Electricity Supply Code) Regulation 2005 has been annexed as annexure-A to the counter affidavit. Chapter 9 deals with enhancement and reduction of contract demand/sanctioned load. Clauses 9.1 to 9.2.2 read as under: -

"9.1 Enhancement of Contract Demand/Sanctioned load.

9.1.1 The application for enhancement of contract demand/sanctioned load shall be made in the prescribed form and in the manner as specified in new service connection in Clause 5 of these Regulations.

9.1.2 The application for enhancement of load shall be disposed of in the manner and within the time frame as prescribed for new service connection in Clause 6.2.11 of these Regulations.

Provided that the application for enhancement of Contract Demand/Sanctioned Load may be outright rejected by the distribution licensee if the consumer is in arrears of licensee's dues and the same have not been stayed by a court of law or the Commission.

9.2 Reduction of contract Demand/Sanctioned Load.

9.2.1 *The application for reduction of contract Demand sanctioned load shall made in the prescribed form specified for the new service connection.*

Provided that no reduction of load shall be allowed by the Distribution Licensee before expiry of the initial period of agreement."

6. The law relating to electricity in the contractual field is a vital facet of our administrative law moving around Article 14 of the Constitution of India apart from the provision of Indian Contract Act. Consequently, the agreement for supply of electricity with the Authority acquire a character which is different from mere commercial transaction with private individuals and, therefore, the Authority when it enters into a contract or when it is administering the duty as a welfare State, it cannot be without valid reason exclude any person from dealing with it or take away in an arbitrary or fanciful manner or whim and caprice.

7. In the case of "*Bihar State Electricity Board, Patna and others Versus M/s Green Rubber Industries and others*"{(1990)1 SCC- 731}, the Apex Court while distinguishing the difference between the contractual element and statutory duty of electricity supply authority observed as under :

"Difference between this contractual element and the statutory duty have to be observed. A supply agreement to a consumer makes his relation with the Board mainly contractual, where the basis of supply is held to be statutory rather than contractual. In cases where such agreements are made the terms are supposed to have been negotiated between the consumer and the Board, and unless specifically assigned, the agreement normally would have affected the consumer with whom it is made, as was held in Northern Ontario Power Co. Ltd. Vs. La Roche Mines Ltd."{(1938)3 All ER 755(PC)}

8. Admittedly, respondent-Jharkhand State Electricity Board is monopoly supplier of electricity who has laid down its terms and conditions and the petitioner has entered into an agreement, so there is no question of examining the terms and conditions of contract but refusal to modify the contract in view of subsequent deduction in requirement of electricity can be held to be unconstitutional and ultra vires to the Electricity Act, 2003. The Jharkhand State Electricity Regulatory Authority Commission acts as the State instrumentality in implementing the welfare policy of the Government in conformity with the Constitutional norms which could be judged on the ground of arbitrariness, unreasonableness and un-constitutional mandate of Article 14 of the Constitution of India.

9. The principle has been enunciated by the Supreme Court in the case of "*Central Inland Water Transport Corporation Ltd. and Anr. Vs.*

Brojo Nath Ganguly and Anr" (1986 (3) SCC 156). Their Lordships observed that for the purpose of testing the reasonableness or fairness of the clause of contract where there is full quality of bargaining power, all the provisions of the contract must be taken into consideration. This is in consonance with the right and reasons intended to secure social and economic justice and conform to the mandate of great equality clause of Article 14 of the Constitution. This principle will apply where inequality of bargaining is the result of great disparity in the economic strength of the contracting party or where inequality is the result of circumstances, whereof the creation of the parties or not where the weaker party is in a position in which he can obtain goods or services only upon the terms imposed by the stronger party or where a man has no choice or rather no meaningful choice but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, howsoever unfair, unreasonable and unconscionable a clause in that contract or form or rules may be.

10. In the case of "*Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress and Ors*" 1991 (Supp) (1) SCC, 600), the Supreme Court observed that Govt. carries on various trade and business activities through the instrumentalities of the State such as Govt. Company or Public Corporation. Such Govt. Companies or Public Corporation being the State instrumentalities are the State within the meaning of Art. 12 of the Constitution, and as such they are subject to observance of fundamental rights embodied in Part III as well as to conform to the directive principles in Part IV of the Constitution.

11. The law in the United Kingdom is set out in the Unfair Contract Terms Act, 1977, which confers the power to strike down a term in a contract which represents an unconscious use of power arising out of the circumstances and conditions of the contracting party (*Hart Vs. O' Connor* (1985 (2) All ER, 880 (PC). However, the courts in that country have also held that a contract will not be struck down as unconscionable unless one of the parties to it has imposed the objectionable term in a morally reprehensible manner, by taking advantage of the weakness or necessity of the other.

12. From perusal of the Electricity Act, 2003, it is evident that there is no provision which prevents the consumer to reduce contract demand within the stipulated period of three years. The word used in Clause 9(a) of the Agreement is "determination" which in my opinion prudently

amount to mean to mend something. Clause 9(a) prevents a consumer from determining an agreement or closing or ending an agreement within a period of three years from the initial date of supply but does not prevent the consumer to enter into an additional agreement either for addition of load or reduction of load. Clause 9.2.1 of the Electricity Supply Code is not in consonance with the provisions of the Electricity Act, 2003. If the Board can enhance the supply and enter into supplementary agreement for enhancement of load within the period of three years then there is no reason as to why the Board cannot reduce the load within the said period of three years. The said clause 9.2.1 of the Electricity Supply Code is in my opinion appears to be discriminatory in as much as no period is prescribed for enhancement of contract demand but a period has been prescribed for reduction of contract demand .

13. Another aspect of the matter which needs consideration is that when agreement is not going to be terminated but only reduction of contract demand is made, it would be in the interest of needy persons and also for the authority to divert excess supply of electricity to the needy person who are waiting for the electricity particularly having regard to the fact that there is an acute scarcity of electric energy in the country and there is long queue for availing the facility of supply of electricity.

14. Recently, in the case of **Bihar Hydro Carbon Products (P) Ltd. Vs Bihar State Electricity Board and others** [CWJC No.581 of 2001], a Division Bench of this Court considering a similar case where the Board refused to reduce the load before expiry of the time fixed in the agreement. A Division Bench of this Court observed: -

"From perusal of the original agreement and the additional agreement it appears that ordinarily the agreement shall remain in force for three years at the first instance from the date of commencement of supply of electricity and as per clause 9(a) the consumer shall not be at liberty to determine the agreement before the expiry of three years from the date of commencement of supply of electricity. Admittedly, first original agreement was executed in 1995 and immediately after 1-1½ years the petitioner and the Board executed additional agreement enhancing the load from 135 KVA to 280 KVA. When the earlier application for enhancement of load was entertained and considered by the Board within 1-1½ years, the Board cannot be allowed to say that reduction of load from 280 KVA to 135 KVA cannot be considered within a period of three years. Mr. V.P. Singh submitted that in terms of the agreement Board is empowered to execute additional agreement or terminate the agreement even before three years but the consumer cannot determine the agreement before the expiry of three years. This Court is of the view when the Board can execute additional agreement even before expiry of three years why not the consumer will have the liberty to approach the Board for execution of additional agreement before the expiry of three years. Clause 9(a) of the agreement shall be equally applicable to both the Board and the consumer."

15. In the instant case, as noticed above, the petitioner initially entered into an H.T. agreement with the respondent-Board for the supply of electricity having connected load of 325 KVA which was time to time enhanced upto 4000 KVA by entering into additional agreements. However, subsequently a request was made by the petitioner to reduce the supply of electricity because of changed circumstances in the running of his industry and consequent modification in terms of the contract. However, the request was rejected. The refusal to reduce the contract demand firstly resulted in blockade of electric energy and creating obstruction for others. Secondly, the petitioner will be bound to pay the minimum guarantee charges without being availed and needed the excess supply of electric energy. It is apparent that the petitioner is not aggrieved by the terms of the agreement and he is paying the minimum guarantee charges as stipulated in the agreement even though the requirement of the petitioner for the electricity has reduced. He applied for reduction of the quantity of electricity which has natural consequence in the reduction of guarantee charges. It is made clear that the petitioner has not asked for termination of the H.T. agreement, rather reduction of the contract demand. In our considered opinion, such request of the consumer cannot be denied on the ground of the proviso contained in Clause 9.2.1 of the Regulatory Commission Regulation, 2005. Such clause in the Regulation, in our considered opinion, is discriminatory, arbitrary and against the public policy.

16. After considering the entire facts of the case and law discussed herein before, this writ petition is allowed and the impugned order refusing to reduce the contract demand is set aside.

I agree
D.K. Sinha, J.

Sd/- M.Y. Eghal, A.C.J.

Sd/- D.K. Sinha, J.

Certified to be true Copy

Sd/-
20/11/09
Copying Officer

(Designated under Rule 257 (ii) of J.H.C. Rules)

Authorised U.O. No. of 1072

The 30th - Fauch. 1930
20/11/09

Subind
20/11/09